

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision Of The Commission's	)	CC Docket No. 94-102
Rules To Ensure Compatibility	)	
With Enhanced 911 Emergency	)	
Calling Systems	)	

To: The Commission

**COMMENTS IN SUPPORT OF PETITIONS FOR RECONSIDERATION  
FILED BY ALLTEL COMMUNICATIONS, INC., DOBSON CELLULAR  
SYSTEMS, INC. AND AMERICAN CELLULAR CORPORATION**

South Central Utah Telephone Association, Inc. ("South Central"), by its attorneys and pursuant to the Commission's Public Notice, Mimeo DA 02-2285, dated September 16, 2002, hereby submits its comments in support of the petitions filed by ALLTEL Communications, Inc. ("ALLTEL"), Dobson Cellular Systems, Inc. ("Dobson") and American Cellular Corporation ("ACC") (collectively, "the Petitioners") requesting reconsideration of the strict liability standard for future enforcement actions, as set forth in the Commission's recent Order to Stay, FCC 02-210, released July 26, 2002 ("Stay Order") in CC Docket No. 94-102. In support hereof, the following is shown:

**Statement of Interest**

1. South Central is a Tier III, non-nationwide Commercial Mobile Radio Service ("CMRS") carrier, as defined in the Stay Order. In the Stay Order, South Central received a temporary stay of its Rule 20.18 E-911 Phase II obligations. Accordingly, South Central has an interest in the Commission's decision on the issue raised in the pending petitions.

**Argument**

2. The Petitioners request reconsideration of the Commission's seeming adoption in the Stay Order of a strict liability standard<sup>1</sup> specifying that non-nationwide CMRS carriers will be deemed non-compliant with Section 20.18 of the Rules, and their individual awards of temporary relief, for failure to meet the new interim performance benchmarks set forth in the Stay Order without regard to a vendor, manufacturer or another entity's inability to supply E-911 compliant products (ALLTEL Petition, pp. 2-4; Dobson/ACC Petition, pg.2). As the Petitioners correctly note, the Commission's action in apparently adopting a strict liability standard for future enforcement actions is in conflict with the clear requirements of Section 503 of the Communications Act of 1934, as amended ("the Act"), which specifies that carriers are entitled to a bona fide opportunity to counter a Commission determination of noncompliance (or, at a minimum, to demonstrate why an excusal of noncompliance is warranted) (ALLTEL Petition, pg. 4; Dobson/ACC Petition pp. 4-5). As both Petitioners correctly note, this requirement is codified in Section 503(b)(4) of the Act, which specifies in relevant part that "[N]o forfeiture penalty shall be imposed under this subsection against any person unless and until ... the Commission issues a notice of apparent liability, in writing, with respect to such person; [and] such person is granted an opportunity to show ...why no such forfeiture penalty should be imposed" (emphasis added) (ALLTEL Petition, pg. 4;

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<sup>1</sup> See Stay Order, Paragraph Nos. 36 and 37.

Dobson/ACC Petition, pp. 4-5).

3. In addition to the arguments advanced by the Petitioners, South Central wishes to emphasize that under Sections 503(b)(1)(A) and 503(b)(1)(B) of the Act and Sections 1.80(a)(1) and 1.80(a)(2) of the Rules (the only sections applicable to the issue presented), a forfeiture penalty may be assessed only against a person who has "willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument of authorization issued by the Commission;" or who has "willfully or repeatedly failed to comply with any of the provisions of [the Act]; or of any rule, regulation or order issued by the Commission under the Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding on the United States" (emphasis added). For purposes of these statutory and Rule sections, the terms "willful" and "repeated" are as defined in Sections 312(f)(1) and 312(f)(2) of the Act, respectively.<sup>2</sup> Section 312(f)(1) of the Act states that "[t]he term 'willful,' when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States" (emphasis added). As noted by the Commission in Southern California Broadcasting Company, 6 FCC Rcd. 4387, Para.

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<sup>2</sup> See, e.g., Cellular Systems Northwest, Inc., 14 FCC Rcd. 3955 n. 2, 1999 FCC LEXIS 1000 (1999).

5, 1991 FCC LEXIS 3791 (1991), "Willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the law" (emphasis added). Accord, Preferred Entertainment, Inc., 14 FCC Rcd. 11105, Para. 7, 1999 FCC LEXIS (1999). Section 312(f)(2) of the Act states that "[t]he term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."

4. Given these statutory and Rule provisions, it is readily apparent that a strict liability standard, such as the one seemingly set forth in the Stay Order, contradicts the forfeiture assessment standards set forth in the Act and in the Rules. The Commission has stated that no forfeiture is warranted where the alleged violation was "caused by accident or mistake,"<sup>3</sup> or where the alleged violation was caused by "unavoidable circumstances."<sup>4</sup> Similarly, "a licensee is responsible for his own acts or omissions,"<sup>5</sup> and the acts or omissions which constitute a violation must be "committed knowingly."<sup>6</sup>

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<sup>3</sup> Cellular Systems Northwest, Inc., 14 FCC Rcd. 3955, Para. 5, 1999 FCC LEXIS 1000 (1999)

<sup>4</sup> Southern California Broadcasting Company, 6 FCC Rcd. 4387, Para. 4, 1991 FCC LEXIS 3791 (1991) citing Vernon Broadcasting, Inc., 60 RR2d 1275, 1277 (1986).

<sup>5</sup> Virginia RSA 6 Cellular Limited Partnership, 7 FCC Rcd. 8022, Para. 4, 1992 FCC LEXIS 6732 (1992).

<sup>6</sup> Russellville Educational Broadcast Foundation, 14 FCC Rcd. 13508, Para. 6, 1999 FCC LEXIS 3996 (1999).

5. In the context of this case, the inability of unaffiliated third-party vendors, manufacturers or other suppliers to supply E-911 compliant products is not the "conscious and deliberate" act or omission of the Petitioners. Instead, it is the act or omission of the vendors, manufacturers or other suppliers. Hence, it cannot be held to be the "willful" or "repeated" act or omission of the Petitioners. Equally as significant, the inability of unaffiliated third-party vendors, manufacturers or other suppliers to supply E-911 compliant products means that any inability on the part of the Petitioners to meet the new deadlines set forth in the Stay Order will be due to unavoidable circumstances. The Commission has held that no violation is present where the underlying facts constituting the alleged act or omission demonstrate that the alleged violation was caused by unavoidable circumstances. See Vernon Broadcasting, Inc., 60 RR2d 1275, 1277 (1986) cited in Southern California Broadcasting Company, 6 FCC Rcd. 4387, Para. 4, 1991 FCC LEXIS 3791 (1991).

6. It should also be emphasized that penalizing the Petitioners in a future enforcement action for failing to deploy equipment which is not available from unaffiliated third-party vendors, manufacturers and other suppliers would run contrary to the policy reasons underlying the assessment of monetary forfeitures. For example, the Commission has stated that monetary forfeitures are intended "to impel broadcasters to become familiar with the terms of their licenses and the applicable Rules, and to adopt procedures, including periodic review of operations, which

will insure that stations are operated in substantial compliance with their licenses and the Commission's Rules." Crowell-Collier Broadcasting Corporation, 44 FCC 2444, 2449 (1961). Stated differently, monetary forfeitures are a remedial sanction intended to impress upon regulatees their duty to be familiar with the requirements applicable to them and to adopt procedures to ensure that these regulatory duties are properly discharged. To state the obvious, penalizing a licensee for failure to deploy equipment that is not available (which, by definition, cannot possibly be deployed) does absolutely nothing to promote the remedial objectives that the forfeiture policy was intended to foster.

7. Finally, it perhaps goes without saying that successfully deploying E-911 Phase II technology is a joint effort, requiring the cooperation and readiness of carriers, equipment suppliers, and public safety agencies. While the Commission has jurisdiction over the affected carriers, it does not have jurisdiction over the equipment suppliers and public safety agencies involved. In apparently holding the Petitioners to the strict liability standard adopted in the Stay Order, the Commission fails to acknowledge that the carrier may be the least to blame in a situation where E-911 Phase II technology is not deployed in accordance with the timetable established by the Commission. Although the Commission will be unable to penalize the equipment suppliers or the public safety agencies, as the case may be, the presumption that the carrier is the one at fault and should be penalized, until proven otherwise, runs contrary to basic fairness and elementary due

process. The strict liability standard for carriers is simply a bad idea and should be reconsidered.

**WHEREFORE**, South Central requests that the Petitions for Reconsideration filed by ALLTEL, Dobson, and ACC be granted.

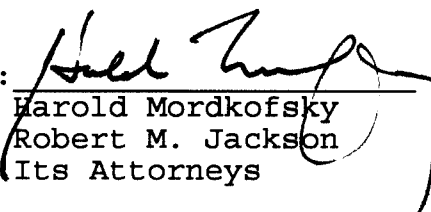
Respectfully submitted,

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Dated: October 16, 2002

By:

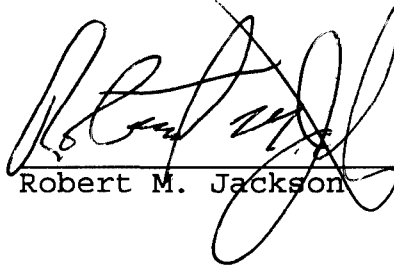
  
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**CERTIFICATE OF SERVICE**

I hereby certify that I am an attorney with the law offices of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, and that on October 16, 2002 I caused to be mailed by first class United States mail, postage prepaid, a copy of the foregoing **"Comments In Support Of Petitions For Reconsideration Filed By ALLTEL Communications, Inc., Dobson Cellular Systems, Inc. And American Cellular Corporation"** to the following:

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